Supreme Court, U.S.
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No. 00-1024

In The

Supreme Court of the United States

NEIL C. GORDON, CHAPTER 7 TRUSTEE FOR THE ESTATE OF SLAUGHTER COMPANY & ASSOCIATES, INC.,

Petitioner,

v.

ALCATEL CONTRACTING (NA), INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

The Respondent Alcatel Contracting (NA), Inc. ("Alcatel") (now merged with Alcatel NA Cable Systems, Inc.) is a Delaware corporation, and its parent corporation is Alcatel S.A. There is no publically held company that owns ten percent (10%) or more of Alcatel's stock.

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REASON FOR DENYING PETITION

There is no reason, much less the compelling reason required by Rule 10, for the Court to exercise its discretionary authority to review the Eleventh Circuit's decision. In affirming the District Court's decision, the Eleventh Circuit merely applied the age-old principle that a court has the inherent authority to correct its own clerical mistake. Here the principle was applied to a situation when, even though Alcatel's counsel had filed the required notice pursuant to Bankruptcy Rule 9010 expressly directing the Bankruptcy Court to serve counsel with all notices in the case, the Bankruptcy Court inexplicably failed to serve Alcatel's counsel with the notice of the bar date for proofs of claim. The Eleventh Circuit's decision does not conflict with any decisions of this Court or of any other United States Court of Appeal and certainly does not decide an important question of federal law that should be resolved by this Court. Therefore, the petition filed by Neil C. Gordon, as Chapter 7 Trustee for Slaughter Company & Associates, Inc. (the "Trustee"), should be denied.

I.

THE BANKRUPTCY COURT HAS AUTHORITY TO CORRECT ITS CLERICAL MISTAKE IN FAILING TO SERVE ALCATEL'S COUNSEL WITH THE BAR DATE NOTICE

The Trustee contends that Section 726(a)(2) of the Bankruptcy Code, 11 U.S.C. § 726(a)(2), and Bankruptcy Rules 3002(c) and 9006(b)(3) deny a bankruptcy court the power to treat a late-filed proof of claim in a Chapter 7

case as timely even when the creditor is late in filing its proof of claim due to a clerical error by the court. As this Court, however, has noted and numerous other courts have concluded, a court has the inherent authority to correct its own clerical mistake. *E.g., American Trucking Associations, Inc. v. Frisco Transportation Co.*, 358 U.S. 133, 79 S. Ct. 170, 3 L. Ed. 2d 172 (1958); *Gagnon v. United States*, 193 U.S. 451, 24 S. Ct. 510, 48 L. Ed. 745 (1904); *Marshall v. Demos (In re Demos)*, 57 F.3d 1037, 1040 (11th Cir. 1995); *Nicholson v. Isaacman (In re Isaacman)*, 26 F.3d 629, 623-33 (6th Cir. 1994) (cased cited). In addition, a bankruptcy court specifically has the authority under Section 105(a) of the Bankruptcy Code to "issue any order . . . that is necessary or appropriate to carry of the provisions of . . . [the Bankruptcy Code.]" 11 U.S.C. § 105(a). *See also* Bankruptcy Rule 9024 & Fed. R. Civ. P. 60(a) (court may correct clerical mistakes in judgments, orders and other parts of record at any time). Section 105 is given a broad construction, *e.g., Jove Engineering, Inc. v. Internal Revenue Service*, 92 F.3d 1539, 1554 (11th Cir. 1996), and authorizes a bankruptcy court to allow a late filing caused by the court's clerical mistake, even though more specific provisions of the Bankruptcy Code and Bankruptcy Rules do not expressly authorize the late filing. *Accord Demos*, 57 F.3d at 1040 (bankruptcy court should have exercised its equitable powers under Section 105 to allow late-filed dischargeability complaint); *Isaacman*, 26 F.3d at 632-33 (bankruptcy court should exercise its equitable powers to allow late-filed dischargeability complaint when creditor reasonably relies on bankruptcy court's erroneous notice of bar date); *Themy v. Yu (In re Themy)*, 6 F.3d 688, 689-90 (10th Cir. 1993) (bankruptcy

court had inherent equitable power to accept late-filed dischargeability complaint by creditor who relied on bankruptcy court's notice setting incorrect deadline) (cases cited).[1] Neither Section 726(a)(2) of the Bankruptcy Code nor Bankruptcy Rules 3002(c) and 9006(b)(3) preclude the bankruptcy court from exercising its inherent authority to correct a clerical mistake by the court.

As the District Court expressly concluded (Trustee App. 7), once Alcatel's counsel filed its request for notices under Bankruptcy Rule 9010, the Bankruptcy Court had a

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[1] A number of the decisions dealing with the bankruptcy court's authority to accept late filings caused by a clerical mistake concern the late filing of dischargeability complaints under Sections 523 and 727 of the Bankruptcy Code, 11 U.S.C. §§ 523 and 727, and Bankruptcy Rules 4004(a) and 4007(c). The Trustee attempts to distinguish these cases from proof of claim cases. The reasoning of these decisions, however, applies at least equally to cases involving the late filing of a proof of claim due to the court's clerical error, because the provisions of the Bankruptcy Code and the Bankruptcy Rules governing bar dates for filing dischargeability complaints and proofs of claims in Chapter 7 cases are similar. Both Section 726(a)(2) of the Bankruptcy Code dealing with proofs of claim, and Section 523(a)(3), which governs dischargeability complaints, contain a provision regarding the creditors' "notice or actual knowledge of the case in time for such timely filing." 11 U.S.C. § 523(a)(3). Bankruptcy Rules 4004(a) and 4007(c) require a dischargeability complaint to be filed no later than 60 days after the first date set for the Section 341 creditors' meeting, whereas proofs of claim under Bankruptcy Rule 3002(c) must be filed no later than 90 days after the first setting of the creditors' meeting. Allowing a proof of claim filed late due to a court's clerical error is even more compelling because a creditor has a constitutional right to due process before its interests can be impaired. *See, e.g., City of New York v. New York, New Haven & Hartford Railroad Co.*, 344 U.S. 293, 296-97, 73 S. Ct. 299, 301, 97 L. Ed. 333 (1953).

duty under Bankruptcy Rules 2002(e), 2002(g), 3002(c)(5) and 9010 to serve the bar date notice upon Alcatel's counsel. *See, e.g., Richmond v. United States*, 172 F.3d 1099, 1103 (9th Cir. 1999) (creditor entitled to receive all notices provided for under Bankruptcy Rules before rights as creditor impaired); *Demos*, 57 F.3d at 1039 (creditor is entitled to rely on information contained in court order); *Isaacman*, 26 F.3d at 632 (parties entitled to rely on information issued by bankruptcy court); *Kaiser Aerospace & Electronics Corp. v. Teledyne Industries, Inc.*, 229 B.R. 860, 873 (S.D. Fla. 1999) (party has right to assume it will receive all required notices before its claim is barred); *Morgan v. Barsky (In re Barsky)*, 85 B.R. 550, 553 (C.D. Cal. 1988), *aff'd*, 933 F.2d 1013 (9th Cir. 1991) (creditor is entitled to assume that it will receive all notices required by Bankruptcy Rules). Rule 9010 of the Bankruptcy Rules expressly authorizes a creditor to appear in a bankruptcy case through an attorney and to have the attorney act on its behalf. Bankruptcy Rule 2002(g) states that all required notices must be served by the court as the creditor "may direct in a filed request," Fed. R. Bankr. P. 2002(g), and Rule 3002(c)(5) specifies that "[i]f notice of insufficient assets to pay a dividend was given to creditors pursuant to Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall notify the creditors of that fact and that they may file proofs of claim within 90 days after the mailing of the notice." Fed. R. Bankr. P. 3002(c)(5). These rules embody both the concepts of due process and effective assistance of counsel. *E.g., In re Lomas Financial Corp.*, 212 B.R. 46, 53-54 (Bankr. D. Del. 1997) (because its attorney had filed a notice of appearance under Bankruptcy Rule

9010, a creditor was denied due process when the debtor failed to give the creditor's attorney notice of the hearing on the debtor's objection to the creditor's claim, even though notice was given to the creditor and to another attorney in the same firm who was representing a different creditor in the same case); *In re Grand Union Co.*, 204 B.R. 864, 872 (Bankr. D. Del. 1997) (due process requirement of adequate notice not satisfied when bar date notice sent directly to personal injury claimants rather than to known attorney); *In re Birdneck Apartment Associates, II, L.P.*, 152 B.R. 65, 67 (Bankr. E.D. Va. 1993) (because the debtor failed to give notice to creditor's attorney of amended plan and confirmation hearing on plan, the order confirming the amended plan was vacated, even though notice of the plan and hearing was given directly to the creditor); *Pembroke State Bank v. Melvin (In re Melvin)*, 1990 WL 375159 (Bankr. S.D. Ga. Oct. 18, 1990) (order confirming Chapter 13 plan was vacated when, after the creditor's attorney made an appearance of record in the case, the debtor did not give the creditor's attorney notice of the continued confirmation hearing, even though notice of this hearing was sent directly to the creditor). Therefore, as the District Court and the Eleventh Circuit held, under Bankruptcy Rules 2002(g), 3002(c)(5) and 9010, the Bankruptcy Court was required to serve Alcatel's counsel with a copy of the bar date notice, and the Bankruptcy Court clerk's mistake in failing to serve Alcatel's counsel cannot be the basis for effectively disallowing Alcatel's claim.[2]

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[2] Throughout his petition, the Trustee chides the Eleventh Circuit and the District Court for not citing, referencing or

II.

THE ELEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH SECTION 726 OF THE BANKRUPTCY CODE AND THE APPLICABLE BANKRUPTCY RULES

The Trustee argues that "[t]here is no provision in the Bankruptcy Code or Rules which would allow Alcatel's late-filed proof of claim to be treated as timely filed." (Trustee Petition at 11). Yet, as the Trustee acknowledges, the provisions of the Bankruptcy Code should be given their plain meaning. *E.g., Inglesby, Falligant, Horne, Courington & Nash, P.C. v. Moore (In re American Steel Product, Inc.)*, 197 F.3d 1354 (11th Cir. 1999). In construing a statute's plain meaning, the statute must be read as a whole, giving meaning to each of its parts. *E.g., United States v. McLymont*, 45 F.3d 400, 401 (11th Cir.), *cert. denied*, 514 U.S. 1077 (1995). The Trustee contends that under Section 726(a)(2) a creditor's mere knowledge of a pending Chapter 7 bankruptcy case is sufficient notice of the bar date for proofs of claim, but Section 726(a)(2)(C)(i) states that the creditor must have "notice or actual

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addressing Section 726(a)(2) of the Bankruptcy Code and Bankruptcy Rule 3002(c). (Trustee Petition at 6, 9, 10 & 18). The Trustee seems to suggest that the Eleventh Circuit and the District Court somehow ignored or overlooked these provisions. Alcatel and the Trustee, however, briefed Section 726(a)(2) and Bankruptcy Rule 3002(c) at length before both the District Court and the Eleventh Circuit and addressed the same points in oral argument before the Eleventh Circuit. The Eleventh Circuit and the District Court plainly and simply held that the court has the inherent authority to correct its clerical mistake in failing to send the bar date notice to Alcatel's counsel.

knowledge of the case in time for timely filing of a proof of such claim. . . . " 11 U.S.C. § 726(a)(2)(C)(i). The "actual knowledge" under Section 726(a) must be sufficient prior knowledge to allow the creditor to take reasonable steps to protect its interests. *See, e.g., In re Stratton*, 29 B.R. 93, 95 (Bankr. W.D. Ky. 1983) ("actual knowledge" sufficient under Section 726(a)(2) to justify disallowing the claim of a creditor who did not receive actual notice of the bar date must be the equivalent of legal notice); *Mitchell Construction Co. v. Smith (In re Smith)*, 180 B.R. 311, 318 (Bankr. N.D. Ga. 1995) (even though creditor became aware of the bankruptcy case prior to bar date, knowledge of the case was not acquired sufficiently in time to allow a timely filing).

The cases the Trustee cites to support his argument are primarily "asset" Chapter 7 cases. In an "asset" Chapter 7 bankruptcy case, a creditor with actual knowledge of the bankruptcy case easily can calculate the bar date for proofs of claim, because under Bankruptcy Rule 3002(c) the bar date always will be ninety (90) days from the date the Section 341 creditors' meeting is initially scheduled. *See, e.g., Byrd v. Alton (In re Alton)*, 837 F.2d 457, 460-61 (11th Cir. 1988) (with knowledge of case, creditor could refer to Bankruptcy Rules to determine deadlines). By contrast, in a "no asset" Chapter 7 case such as this one, the bankruptcy court expressly directs creditors not to file proofs of claim until they receive further notice from the court and, therefore, a creditor cannot determine the bar date for proofs of claim by simply being aware of the bankruptcy case.

In recognition of this distinction between "asset" and "no asset" cases, Bankruptcy Rule 3002(c)(5) imposes an

affirmative duty upon the bankruptcy court to notify all creditors of the bar date once the Chapter 7 trustee determines that there may be sufficient assets in the estate. This Rule 3002(c)(5) notice is of special significance, because the Chapter 7 bankruptcy case may have been pending for a substantial time before the trustee determines that there are sufficient assets available to justify requiring creditors to file proofs of claim (such as in this case when the case had been pending for eighteen (18) months before the bar date notice was issued).[3] In *United States v. Hairopoulos (In re Hairopoulos)*, 118 F.3d 1240 (8th Cir. 1997), the Eighth Circuit emphasized the significance of this Rule 3002(c)(5) notice and the distinction between "asset" and "no asset" Chapter 7 cases, noting that:

> This type of no-asset notice, explicitly directing creditors not to file claims because they will not be processed or acknowledged, cannot be the type of notice that put the IRS on inquiry notice that its claim may be further affected. No duty to inquire could be imputed under the facts of this case.

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[3] Because creditors in a "no asset" Chapter 7 case are directed not to file proofs of claim until they receive further notice to do so, a "no asset" Chapter 7 case is analogous to a Chapter 11 case. In a Chapter 11 case, courts uniformly have held that, as a matter of due process, a known creditor must receive notice of the bar date before its claim can be discharged, and the failure to receive the bar date notice excuses a late-filed claim. *E.g., In re Immenhausen Corp.*, 172 B.R. 343, 349 (Bankr. M.D. Fla. 1994); *see Levin v. Maya Construction Co. (In re Maya Construction Co.)*, 78 F.3d 1395, 1399 (9th Cir.), *cert. denied*, 519 U.S. 862 (1996) (mere knowledge of a Chapter 11 case does not inform a creditor of a court-ordered bar date).

118 F.3d at 1246. Therefore, in a "no asset" case, because mere knowledge of the case is not sufficient to enable the creditor to determine the bar date for proofs of claim, Bankruptcy Rules 2002(e) and 3002(c)(5) require the bankruptcy court to send notice of the bar date to all creditors, and a creditor is entitled to rely upon the bankruptcy court's duty to give the required notice.

III.

THIS COURT'S DECISION IN *PIONEER* DOES NOT APPLY

The Trustee argues that the Eleventh Circuit's decision conflicts with this Court's decision in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993). In *Pioneer*, this Court noted in dicta that the "excusable neglect" standard under Bankruptcy Rule 9006(b)(1) does not apply in Chapter 7 cases. Neither the District Court nor the Eleventh Circuit applied the "excusable neglect" standard. Therefore, *Pioneer* does not apply.

IV.

THE ELEVENTH CIRCUIT'S DECISION PROMOTES CHAPTER 7 POLICY

The Trustee contends that the Eleventh Circuit's decision undercuts the objective in Chapter 7 cases to promptly liquidate and distribute the debtor's estate. Allowing Alcatel's claim as timely filed, however, will not impede in any way the Trustee's liquidation of this

Chapter 7 estate. Alcatel filed its proof of claim approximately one (1) month after the bar date, and the Trustee has not made any distribution to unsecured creditors. In addition, another purpose of bankruptcy is to provide a means for a fair distribution of the debtor's assets to all of its creditors. *See, e.g., Hall v. Goforth (In re Goforth)*, 179 F.3d 390, 395 (5th Cir. 1999); *Chemical Bank v. First Trust of New York (In re Southeast Banking Corp.)*, 156 F.3d 1114, 1118 (11th Cir. 1998)(overriding theme of bankruptcy law is equitable distribution of debtor's assets among creditors). Treating Alcatel's claim as timely filed will further the purpose of ensuring a fair distribution of the Chapter 7 estate. The debtor acknowledged in its schedules filed with the Bankruptcy Court that Alcatel had a liquidated, undisputed and non-contingent claim in the amount of $272,000. Neither the Trustee, the debtor nor any other creditor has ever objected to Alcatel's claim.

Even assuming, however, that allowing Alcatel's claim as timely filed would somehow delay the Trustee's liquidation of this Chapter 7 estate, the goal of promptly distributing a Chapter 7 estate cannot override a creditor's constitutional right to notice before its interests are impaired. Alcatel's counsel was entitled to receive the bar date notice, and the Bankruptcy Court's mistake in failing to serve this notice on Alcatel's counsel cannot be the basis for subordinating Alcatel's claim to the claims of all other unsecured creditors and thereby effectively disallowing Alcatel's claim.[4]

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[4] The Trustee contends that "the Eleventh Circuit has placed the burden upon the Chapter 7 Trustee, and not the creditor, to monitor the Clerk's office matrix to ensure that

V.

THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL

The Trustee contends that the Eleventh Circuit's decision conflicts with the Ninth Circuit's decision in *Zidell, Inc. v. Forsch (In re Coastal Alaska Lines, Inc.)*, 920 F.2d 1428 (9th Cir. 1990), and that, therefore, a conflict now exists among the Circuits. *Coastal Alaska*, however, is distinguishable from this case. In *Coastal Alaska*, the Ninth Circuit refused to treat the late-filed claim of Zidell, Inc. ("Zidell") as timely, even though Zidell never received a copy of the bar date notice. The court reached this conclusion not simply because Zidell became aware of the bankruptcy case prior to the bar date, but because Zidell never took any action to ensure that it was included on the list

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proper notice is being sent to the appropriate parties in order for the trustee to avoid liability in administering the assets of the estate." (Trustee Petition at 15). There is nothing in the Eleventh Circuit's decision, however, imposing any such duty on the Trustee. A Chapter 7 trustee in a "no asset" case should assist the bankruptcy court in ensuring that all persons entitled to notice of a bar date receive this notice, but neither the Bankruptcy Code, the Bankruptcy Rules nor the Eleventh Circuit's decision imposes a duty on the Trustee to do this. *See* 11 U.S.C. § 704; Fed. R. Bankr. P. 2015. Therefore, the Trustee's suggestion that he may be personally liable for failing to monitor the court's mailings is unsupported. *See, e.g., Mosser v. Darrow*, 341 U.S. 267, 71 S. Ct. 680, 95 L. Ed. 927 (1951) (trustee personally liable for willfully and deliberately breaching fiduciary duty); *In re Smyth*, 207 F.3d 758 (5th Cir. 2000) (bankruptcy trustee not personally liable unless grossly negligent).

of creditors. Even though Zidell learned of the bankruptcy case in early August, 1986, Zidell did not request to be added to the bankruptcy court's mailing list until October 30, 1986, by which time the bar date for filing proofs of claim had already passed. In rejecting Zidell's argument that its late-filed claim should be treated as timely, the Ninth Circuit stated that:

> Thus, Zidell knew that, if assets were found, the court would notify the listed creditors and give them an opportunity to file their claims. Zidell also knew that it had not been named as a creditor and therefore would not receive statutory notice. Under these circumstances, Zidell had sufficient notice and reasonable opportunity to appear as a creditor and receive statutory notice. It should have had itself added to the list of creditors in order to preserve its rights. Unlike the creditor in [City of] New York [v. New York, New Haven & Hartford R.R. Co., 344 U.S. 293, 73 S. Ct. 299, 97 L.Ed. 333 (1953)], Zidell did not act reasonably in waiting to receive notice. . . . Zidell actually received information about the bankruptcy proceedings that was sufficient to put it on inquiry notice. . . . Zidell knew that it was not listed as a creditor. Zidell knew that, unless it took appropriate action, it would not receive, nor was the court required to give, the statutory notice.

920 F.2d at 1431. Therefore, the Ninth Circuit based its decision on Zidell's failure to take any steps to have its name added to the bankruptcy court's list of creditors, not simply on Zidell's awareness of the bankruptcy case.

In reaching its conclusion in *Coastal Alaska*, the Ninth Circuit distinguished *Morgan v. Barsky (In re Barsky)*, 85

B.R. 550 (C.D. Cal. 1988), *aff'd*, 933 F.2d 1013 (9th Cir. 1991), a case similar to this one. In *Barsky*, Carol Morgan ("Morgan") was listed as a creditor on the schedules filed by the debtor Marvin Barsky in his Chapter 13 bankruptcy case, but the bankruptcy court did not send a notice of the bar date to Morgan. In opposing Morgan's request to have her late-filed claim treated as timely, Barsky argued that knowledge of the bar date should be imputed to Morgan because she was aware of the bankruptcy case and the Bankruptcy Rules specify the deadline for filing a proof of claim in a Chapter 13 case. The bankruptcy court agreed with Barsky and denied Morgan's request. On appeal, however, the district court reversed the bankruptcy court, concluding that Morgan, as a creditor listed on Barsky's bankruptcy schedules, was entitled under the Bankruptcy Code and the Bankruptcy Rules to receive the bar date notice. Therefore, the district court held that Morgan's claim could not be denied as untimely when she did not receive the statutorily-required notice. 85 B.R. at 553. Similar to the creditor in *Barsky* (and unlike the creditor in *Coastal Alaska*), Alcatel's counsel filed the required Rule 9010 request for notices in the early stages of the bankruptcy case, well before the Bankruptcy Court sent out the bar date notice; yet the court mistakenly failed to serve Alcatel's counsel with a copy of this notice. Therefore, *Zidell* not only does not conflict with the Eleventh Circuit's decision but suggests that in the same circumstances presented here the Ninth Circuit would have reached the same conclusion as the Eleventh Circuit.

VI.

CONCLUSION

For the foregoing reasons, Alcatel respectfully requests that this Court deny the Petition. In affirming the District Court, the Eleventh Circuit plainly and simply held that the court has the inherent authority to correct its own clerical mistake. The Eleventh Circuit's decision is a proper application of a well-established principle of law, and this case raises no significant legal issues that warrant this Court's review.

Respectfully submitted, this 22nd day of January, 2001.

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